Nos. 88-5014 and 88-5158

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In the Supreme Court of the United States

OCTOBER TERM, 1988

JOSE GOMEZ, PETITIONER

v.

UNITED STATES OF AMERICA

DIEGO CHAVEZ-TESINA, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the Federal Magistrates Act, 28 U.S.C. 631 *et seq.*, permits a district court to delegate jury selection to a federal magistrate.

2. Whether a district court's delegation of jury selection to a federal magistrate violates Article III of the Constitution where the district court provides de novo review of the magistrate's selection of jurors.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Constitutional and statutory provisions involved	2
Statement	2
Introduction and summary of argument	5
Argument:	
I. The Federal Magistrates Act authorizes district courts to delegate jury selection to magistrates	7
II. Magistrates may conduct voir dire without offending Article III	28
III. Any error in the procedure followed in this case was harmless	42
Conclusion	45
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Bank of Nova Scotia v. *United States*, 108 S. Ct. 2369 (1988)	42
Batson v. *Kentucky*, 476 U.S. 79 (1986)	44
Beech Aircraft Corp. v. *Rainey*, 109 S. Ct. 439 (1988)	9
Chapman v. *California*, 386 U.S. 18 (1967)	43
Crowell v. *Benson*, 285 U.S. 22 (1932)	31
Delaware v. *Van Arsdall*, 475 U.S. 673 (1986)	42
Fay v. *New York*, 332 U.S. 261 (1947)	29
Frazier v. *United States*, 335 U.S. 497 (1948)	8
Geras v. *Lafayette Display Fixtures, Inc.*, 742 F.2d 1037 (7th Cir. 1984)	38
Ham v. *South Carolina*, 409 U.S. 524 (1973)	9
Hamling v. *United States*, 418 U.S. 87 (1974)	42
Hayes v. *Missouri*, 120 U.S. 68 (1924)	44
Holy Trinity Church v. *United States*, 143 U.S. 457 (1892)	14
Hopt v. *Utah*, 110 U.S. 574 (1884)	31
Massachusetts v. *Sheppard*, 468 U.S. 981 (1984)	9
Mathews v. *Eldridge*, 424 U.S. 319 (1976)	40

Cases – Continued:

	Page
Mathews v. *Weber*, 423 U.S. 261 (1976)	5, 41
Mistretta v. *United States*, 109 S.Ct. 647 (1989)	27
Northern Pac. R.R. v. *Herbert*, 116 U.S. 642 (1886)	44
Northern Pipeline Co. v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982)	29, 31
Palmore v. *United States*, 411 U.S. 389 (1973)	29
Perry v. *Leeke*, 109 S. Ct. 594 (1989)	42
Philadelphia Newspapers, Inc. v. *Jerome*, 434 U.S. 241 (1978)	9
Pointer v. *United States*, 151 U.S. 396 (1895)	10
Pope v. *Illinois*, 481 U.S. 497 (1987)	42
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Ristaino v. *Ross*, 424 U.S. 589 (1976)	9, 40
Rock v. *Arkansas*, 107 S. Ct. 2704 (1987)	9
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Rushen v. *Spain*, 464 U.S. 114 (1983)	42
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Swain v. *Alabama*, 380 U.S. 202 (1965)	9-10
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Tumey v. *Ohio*, 273 U.S. 510 (1927)	42
United States v. *Ford*, 824 F.2d 1430 (5th Cir. 1987), cert. denied, 108 S. Ct. 741 (1988)	31, 37
United States v. *Hvass*, 355 U.S. 570 (1958)	12-13
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United States v. *Raddatz*, 447 U.S. 667 (1980)	*passim*
United States v. *Rivera-Sola*, 713 F.2d 866 (1st Cir 1983)	28
United States v. *Rodriguez-Suarez*, 836 F.2d 135 (11th Cir. 1988), cert. denied, 109 S. Ct. 875 (1989)	43
Vasquez v. *Hillery*, 474 U.S. 254 (1986)	42
Wingo v. *Wedding*, 418 U.S. 461 (1974)	19, 41
Witherspoon v. *Illinois*, 391 U.S. 510 (1968)	44

Constitution, statutes and rules:

U.S. Const.:	
Art. III	*passim*

Constitution, statutes and rules – Continued:

	Page
Amend. IV	32
Amend. V	32
Due Process Clause	39
Amend. VI	32
Confrontation Clause	42
Federal Magistrates Act, Pub. L. No. 90-578, § 101, 82 Stat. 1108 (1968)	17
28 U.S.C. 631 *et seq.*	2
28 U.S.C. 631(b)(5)	27
28 U.S.C. 633	27
28 U.S.C. 636	7, 13
28 U.S.C. 636(a)	13
28 U.S.C. 636(a)(1)	18
28 U.S.C. 636(b)	19
28 U.S.C. 636(b)(1)	7, 9, 11, 13, 15, 16, 30
28 U.S.C. 636(b)(1)(A)	7, 11, 16
28 U.S.C. 636(b)(1)(B)	8
28 U.S.C. 636(b)(1)(C)	8, 16
28 U.S.C. 636(b)(3)	11, 12, 13, 17, 19, 25
28 U.S.C. 636(b)(4)	16
28 U.S.C. 636(c)	14, 38
Jury Selection and Service Act of 1968, 28 U.S.C. 1861 *et seq.*	11, 29
28 U.S.C. 1867(a)	12
18 U.S.C. 1952	2
18 U.S.C. 1962(c)	2
18 U.S.C. 3401(a)	14
21 U.S.C. 841(a)(1)	2
21 U.S.C. 846	2
28 U.S.C. 604(d)(4)	27
Fed. R. Crim. P.:	
Rule 23	10
Advisory Committee notes	10
Rule 24	10, 11, 12, 13
Advisory Committee notes (1966 Amendment)	10
Rule 54	12
Advisory Committee notes (1972 Amendment)	12
M.D. Ala. R. 32(c)	23
N.D. Ala. Mag. R. 4(f)	22

Statutes and rules – Continued: Page

S.D. Ala. Mag. R. 26(1)(i)(6) 22
D. Alaska R. 3(2) 23
D. Ariz. R. 18(d)(6) 23
C.D. Cal. Mag. R. 1.76 22
E.D. Cal. R. 303(2) 22
N.D. Cal. R. 405(g) 22
S.D. Cal. R. 501-8(f) 22
D. Colo. R. 303(2) 22
D. Conn. Mag. R. 1 23
D. Del. Mag. R. 1(i)(6) 22
D. D.C. R. 501(b)(6) 22
M.D. Fla. R. 6.01(c)(20) 22
N.D. Fla. R. 24(J)(2)(c)(1) 22
S.D. Fla. Mag. R. (1)(i)(6) 22
S.D. Ga. R. 21.5 22
D. Haw. R. 401-8(f) 22
D. Idaho R. 4-101(j)(6) 22
C.D. Ill. R. 3(a)(14) 22
N.D. Ill. R. 1.70(A) 23
S.D. Ill. R. 29(i)(6) 22
N.D. Ind. R. M-1(i)(9) 22
S.D. Ind. R. M-13 22
N.D. Iowa R. 31(j)(4) 22
S.D. Iowa R. 31(j)(4) 22
D. Kan. R. 601(i)(6) 22
E.D. Ky. R. 18(a) 23
W.D. Ky. R. 18(a) 23
E.D. La. R. 20.7(f) 22
M.D. La. R. 26(c)(i)(5) 21
W.D. La. R. 28(a)(9)(e) 22
D. Me. R. 8(c) 23
E.D. Mich. R. C-i(j)(6) 22

Statutes and rules – Continued: Page

W.D. Mich. Mag. R. 1(h)(5) 22
D. Minn. R. 16(e)(5) 22
E.D. Mo. R. 21 23
W.D. Mo. R. 22(K)(6) 22
D. Mont. R. 400-1 23
D. Neb. R. 44(1)(6) 22
D. Nev. R. 500-9(f) 22
E.D. N.C. R. 62.09(f) 22
M.D. N.C. R. 401(b)(4) 22
D. N.D. R. 28(c)(4) 22
D. N.H. Mag. R. D(3) 22
D. N.J. R. 40(A)(5) 22
D. N.M. R. 27(a) 23
E.D. N.Y. Mag. R. 1 23
S.D. N.Y. Mag. R. 1 23
N.D. Ohio R. 19.10(2) 22
S.D. Ohio R. 2.4.1 23
S.D. Ohio (W. Div'n) R.1(1)(6) 22
N.D. Okla. R. 32(B)(12) 23
E.D. Okla. R. 32 23
D. Or. R. 135-1(b) 23
E.D. Pa. R. 7(i)(6) 22
M.D. Pa. R. 901.9(a)(7) 22
W.D. Pa. Mag. R. 6(e) 22
D. P.R. R. 506.6 22
D. R.I. R. 32(e)(5) 22
D. S.C. R. 19.01 23
E.D. Tenn. R. 21.2(d) 22
M.D. Tenn. R. 601(a)(2) 22
W.D. Tenn. R. 17(i)(6) 22
E.D. Tex. R. 15 23

Cases – Continued: Page

S.D. Tex. R. 15(A) 23
E.D. Va. R. 29(N) 23
D. Vt. Mag. R. 1(A)(IX)(a)(iv) 22-23
E.D. Wash. R. 8(d) 23
W.D. Wash. Mag. R. 9(d) 23
N.D. W.Va. R. 4.01(i)(6) 23
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114 Cong. Rec. (1968):
p. 27,227 27
p. 27,341 18
p. 27,342 28
p. 28,360 19
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p. 29,407 18

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Miscellaneous – Continued: Page

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Miscellaneous—Continued: Page

C. Wright, *Federal Practice and Procedure: Criminal 2d* (1982) 8

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (J.A. 21-48) is reported at 848 F.2d 1324.

JURISDICTION

The judgment of the court of appeals was entered on June 1, 1988. A petition for rehearing was denied on August 4, 1988 (J.A. 49-50). The petition for a writ of

certiorari in No. 88-5014 was filed on July 5, 1988, and the petition for a writ of certiorari in No. 88-5158 was filed on July 22, 1988. A supplemental petition for a writ of certiorari in both cases was filed on October 3, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reproduced at App., *infra*, 1a-4a.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioners Jose Gomez and Diego Chavez-Tesina were convicted of possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and conspiring to do the same, in violation of 21 U.S.C. 846. Petitioner Chavez-Tesina was also convicted of conducting a narcotics racketeering enterprise, in violation of 18 U.S.C. 1962(c), and interstate travel in aid of racketeering, in violation of 18 U.S.C. 1952. Petitioner Gomez was sentenced to a total of ten years' imprisonment and a ten-year special parole term. Petitioner Chavez-Tesina was sentenced to a total of 20 years' imprisonment and a lifetime term of special parole. The court of appeals affirmed (J.A. 21-48).

1. Prior to petitioners' trial, the district court assigned the task of jury selection to a magistrate. The assignment was made pursuant to a local rule authorizing magistrates to perform the duties set forth in the Federal Magistrates Act, 28 U.S.C. 631 *et seq.* Petitioners' counsel initially

consented to the assignment,[1] but they subsequently objected before the magistrate at the beginning of jury selection (J.A. 13-15). The magistrate consulted with the district judge, noted the objection, and proceeded to select the jury (J.A. 16-17). The magistrate allowed the government a total of seven peremptory challenges and allowed petitioners and their three co-defendants a total of 14 peremptory challenges (J.A. 6). In order to ensure a jury of 12 and four alternates, the magistrate empaneled 37 prospective jurors (*ibid.*).

During jury selection, the magistrate explained the nature of the charges against petitioners and their co-defendants. The magistrate then questioned the venire at length concerning each prospective juror's ability to be fair and impartial in considering the evidence.[2] When asked by the magistrate whether additional questions were needed, defense counsel did not suggest any further questioning (2/9/87 Tr. 124-125). The magistrate excused 20 prospective jurors based on their responses to his questions (2/9/87 Tr. 21-22, 43, 55, 58, 59, 71, 73, 74, 75, 83, 91-93, 94, 127, 131). The magistrate also excused the only prospective juror the defendants challenged for cause (*id.* at 125-126).[3] After the parties exercised their peremptory

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[1] At a pretrial conference held on November 20, 1986, the district judge assigned jury selection to the magistrate (J.A. 1). As petitioners note (Br. 2 n.2), the court reporter's notes for that conference cannot be located and, consequently, have not been transcribed. As subsequently described by the district judge, however, petitioners' counsel had previously "agreed • • • that the magistrate would do it" (J.A. 18).

[2] The *voir dire* of February 9, 1987, has only recently been transcribed. Petitioners have lodged a copy of that transcript with the Court.

[3] The magistrate declined to excuse for hardship a prospective juror who had an ill relative. No counsel objected to the magistrate's action

challenges, 20 prospective jurors remained, four of whom were excused by the magistrate (*id.* at 132).

Following the magistrate's selection of the jury, the district judge considered the defendants' objections to the magistrate's authority. The judge inquired whether "there is any one juror for whom a challenge for cause was not sustained by [the magistrate]" and whether any party would "like to renew the objection" (J.A. 18). The judge also offered de novo review of any of the magistrate's selection decisions (J.A. 19). Counsel for petitioners did not respond to the invitation and counsel for a co-defendant explained that he sought to raise only "a jurisdictional issue, not an issue to a specific juror" (*ibid.*).

2. The court of appeals affirmed (J.A. 21-48). The court concluded that, consistent with both the Federal Magistrates Act and Article III of the Constitution, a district judge may delegate jury selection to a magistrate. The court rejected petitioners' statutory claim that Congress authorized the delegation of only "pretrial matters" to magistrates and that "pretrial matters" do not include *voir dire* (J.A. 29). According to the court, "even assuming arguendo that jury selection falls on the 'trial' side of the line between 'trial' and 'pretrial,' " the legislative history "plainly states that the [Magistrates Act] grants to district courts the freedom to experiment beyond duties traditionally categorized as 'pretrial' " (*ibid.* (emphasis omitted)). The court also rejected petitioners' assertion that by requiring the parties' consent to the delegation of civil and misdemeanor criminal trials to magistrates, Congress intended to allow the delegation of jury selection only with the parties' consent (J.A. 30). Jury selection, the

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in that regard or otherwise challenged the prospective juror for cause. See 2/9/87 Tr. 87, 93-94.

court explained (*ibid.*), is a function "separate and distinct" from "holding of an entire trial."

The court also rejected petitioners' claim that, even if it is authorized by statute, the delegation of jury selection to magistrates violates Article III (J.A. 30-37). According to the court, jury selection can be delegated to a non-Article III judge without violating Article III, because "the delegation of authority occurs entirely *within* the judicial branch, a circumstance which alleviates greatly the underlying structural separation of powers concern with one branch *encroaching upon* the power of another" (J.A. 33 (emphasis in original)). The court also concluded that where, as in this case, an Article III judge retains the authority to review de novo the magistrate's selection decisions, delegation would not offend Article III even if jury selection were deemed "inherently judicial." The availability of de novo review, the court explained, "vested the ultimate decision regarding the composition of the jury with the trial court" (J.A. 33-34). Finally, the court rejected petitioners' claim that Article III requires an Article III judge to be present during jury selection (J.A. 35-37). The court declined to adopt petitioners' "debatable hypothesis" that "the lack of an Article III judge's physical presence at *voir dire* is somehow demeaning to potential jurors" (J.A. 36).

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress enacted the Federal Magistrates Act in order to provide federal district courts with assistance in handling the avalanche of civil and criminal matters that threatened to overwhelm them. See *Mathews* v. *Weber*, 423 U.S. 261, 268-269 (1976). The purpose of the Magistrates Act was to encourage the use of magistrates for judicial tasks far beyond those previously undertaken by United States

commissioners in order to permit district court judges to focus their attention on their most pressing judicial responsibilities. To that end, Congress upgraded the position and specifically called on federal courts to experiment with the use of magistrates so that the courts could dispense justice more efficiently and expeditiously. With Congress's awareness, the use of magistrates in jury selection in both criminal and civil cases has long been an important aspect of this program. That practice is entirely consistent with Congress's intent in enacting the Magistrates Act and does not offend Article III when, as in this case, it is closely supervised by the district judge.

Contrary to petitioner's submission, jury selection falls within the wide range of duties Congress intended to allow a district judge to delegate to a magistrate. The language of the Magistrates Act is broad and admits of none of the substantial restrictions on magistrate authority that petitioners propose. The legislative history, moreover, shows that Congress intended magistrates to take on a wide variety of duties, and was repeatedly made aware that magistrates would be used in jury selection. Finally, petitioners' proposed construction of the Magistrates Act is refuted by the views expressed by the relevant Judicial Conference committee and the Administrative Office of the United States Courts, which worked closely with Congress during the enactment of the Magistrates Act and which agree that magistrate jury selection is permissible under the Act.

There is likewise no merit to petitioners' claim that Article III forbids magistrates from conducting *voir dire*. This Court rejected a very similar claim in *United States* v. *Raddatz*, 447 U.S. 667 (1980). The Court in *Raddatz* held that allowing a magistrate to conduct a suppression hearing does not violate Article III when the magistrate's proposed findings and recommendations are subject to de novo review by the district judge.

This case is not distinguishable from *Raddatz* in any material respect. Here, as in *Raddatz*, the district judge exercised de novo review, leaving "the entire process * * * under the district court's total control and jurisdiction" (447 U.S. at 683). Contrary to petitioners' claim, moreover, the relationship of *voir dire* to the jury's verdict is no more immediate than is a suppression motion. Nor is meaningful de novo review of *voir dire* impossible. In most circumstances, the judge will likely find it adequate to examine the *voir dire* transcript and hear argument by counsel. And, if circumstances warrant, the judge is of course free to redo the magistrate's work in whole or in part. In this case, however, because petitioners did not object to the quality of the *voir dire* or to the magistrate's decision to seat or excuse any prospective juror, they cannot complain that the review they received was somehow inadequate.

ARGUMENT

I. THE FEDERAL MAGISTRATES ACT AUTHORIZES DISTRICT COURTS TO DELEGATE JURY SELECTION TO MAGISTRATES

A. Section 636 of the Magistrates Act outlines the jurisdiction and powers of magistrates. Two different subsections of Section 636 support the district judge's decision to delegate jury selection to the magistrate in this case.

1. First, Section 636(b)(1) provides that "a judge may designate a magistrate to hear and determine any pretrial matter pending before the court."[4] While the term

[4] The exception in Section 636(b)(1)(A) for certain matters has no bearing on this case. Jury selection is not among those matters excepted and, in any event, the exception is solely for the purpose of mandating a de novo determination by the district judge in those in-

"pretrial," standing alone, is subject to differing interpretations, it may reasonably be read in this context to include jury selection. Jury selection is logically distinct from, and antecedent in time to, the trial itself, which commences with the swearing in of the jury, opening statements, and the introduction of evidence.

The question when a trial begins is perhaps most important in the double jeopardy context. The issue is important in that setting because the constitutional prohibition does not apply until a defendant is "put to trial before the trier of the facts." *Serfass* v. *United States*, 420 U.S. 377, 388 (1975); see *Press-Enterprise Co.* v. *Superior Court of California*, 464 U.S. 501, 509 n.8 (1984). And in that setting, the Court has held that the trial begins after the "jury is empaneled and sworn" (420 U.S. at 388).

The characterization of jury selection as a "pretrial" procedure is not limited to the double jeopardy setting. Rather, this Court and the leading commentators have commonly referred to *voir dire* as occurring prior to trial. See, *e.g.*, *Frazier* v. *United States*, 335 U.S. 497, 513 (1949) (emphasis added) ("After accepting [the jurors] *before trial*, [the defendant] could not challenge them successfully in a motion for a new trial."); 2 C. Wright, *Federal Practice and Procedure: Criminal 2d* § 381, at 342 (1982) ("the voir dire is held immediately before the trial commences"); 2 M. Rhodes, *Orfield's Criminal Procedure Under the Federal Rules* § 25.15 (2d ed. 1986) ("until a jury is sworn, there is not a trial"); W.R. LaFave & J.H. Israel, *Criminal Procedure* § 21.3, at 723 (1984) ("In most

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stances in which a magistrate hears and recommends a particular disposition to which a party objects (see 28 U.S.C. 636(b)(1)(B) & (C)). Hence, the statute allows magistrate consideration of even those pretrial matters nominally "except[ed]" from the grant of magistrate authority.

localities, it is the practice to conduct the voir dire and select the jury immediately preceding the trial of the case in which that jury is to serve."). It is therefore reasonable to view *voir dire* as a "pretrial matter" within the meaning of Section 636(b)(1).

This Courts' precedents do not establish that jury selection is part of the "trial." There is therefore no basis for petitioners' contention (Br. 15-16) that Congress could not have intended in the Magistrates Act to include *voir dire* as a "pretrial matter." While the Court has referred in certain cases to the fact that a "trial judge" conducted *voir dire*, Pet. Br. 15, citing *Ristaino* v. *Ross*, 424 U.S. 589, 595 (1976), and *Ham* v. *South Carolina*, 409 U.S. 524, 528 (1973), that is not any indication that the Court views jury selection as part of the trial. As demonstrated by numerous other instances in which the Court has similarly referred to participation by a "trial judge" in pretrial activities, the Court uses that expression interchangeably with "district court" and without any intention to label a particular activity as part of the "trial."[5]

The other decisions of this Court on which petitioners rely (Br. 15-16) likewise do not address this issue. The Court commented in *Swain* v. *Alabama*, 380 U.S. 202, 219 (1965), that the peremptory challenge is a "necessary part

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[5] See, *e.g.*, *Beech Aircraft Corp.* v. *Rainey*, 109 S. Ct. 439, 444 (1988) (emphasis added) ("The *trial* judge determined, at a *pretrial* conference * * *."); *Rock* v. *Arkansas*, 107 S. Ct. 2704, 2707 (1987) (emphasis added) ("The *trial* judge held a *pretrial* hearing on the motion * * *."); *Richardson-Merrell, Inc.* v. *Koller*, 472 U.S. 424, 427 (1985) (emphasis added) ("the *trial* judge issued a *pretrial* ruling * * *."); *Massachusetts* v. *Sheppard*, 468 U.S. 981, 987 (1984) (emphasis added) ("At a *pretrial* suppression hearing, the *trial* judge concluded * * *."); *Philadelphia Newspapers, Inc.* v. *Jerome*, 434 U.S. 241, 241 (1978) (per curiam) (emphasis added) ("the *trial* judges closed all *pretrial* hearings").

of trial by jury," but in context it is clear that that comment was meant simply to emphasize that the peremptory challenge is " 'one of the most important of the rights secured to the accused.' " *Ibid.*, quoting *Pointer* v. *United States*, 151 U.S. 396, 408 (1895). The Court in *Swain* did not purport to address the quite different question whether the trial itself should be deemed to begin before or after the selection of the jury.

Petitioners note (Br. 16) that Fed. R. Crim. P. 23 and 24, which address jury issues, appear in that portion of the Rules entitled "Trial." The placement of those Rules, however, does not suggest that Congress (or this Court) believes that jury selection is part of the trial itself, rather than a "pretrial" proceeding. The Federal Rules of Criminal Procedure do not, by their internal subheadings, purport to distinguish between pretrial and trial matters.[6] Rule 23, moreover, is simply a "formulation of the constitutional guaranty of trial by jury" and does not address jury selection at all (see notes of Advisory Committee accompanying Rule 23). And while Rule 24 does describe how "trial jurors" are to be selected from the venire, its distinction between "trial jurors" and "prospective jurors," from whom the former are chosen, logically suggests that the selection process is not itself part of the trial. The notes of the Advisory Committee accompanying the 1966 amendment of Rule 24 likewise show that the Committee viewed the jury selection process as distinct, and preliminary to, the trial itself. See 1966 Advisory Committee notes (emphasis added) ("an alternate juror may be

[6] The various subheadings include "scope, purpose, and construction," "preliminary proceedings," "indictment and information," "arraignment and preparation for trial," "venue," "trial," "judgment," "appeal," "supplemental and special proceedings," and "general provisions."

called in the situation where it is first discovered *during the trial* that a juror was unable or disqualified to perform his duties *at the time he was sworn*").

2. While we believe that jury selection can be assigned to a magistrate as a "pretrial" matter under Section 636(b)(1), there is an alternative basis in the statute to authorize magistates to perform that function. Section 636(b)(3) authorizes a district judge to assign to magistrates "such additional duties as are not inconsistent with the Constitution and laws of the United States." The purpose of that subsection is to permit district judges "to experiment in the assignment of other duties to magistrates which may not necessarily be included in the broad category of 'pretrial matters' " (S. Rep. No. 625, 94th Cong., 2d Sess. 10 (1976); H.R. Rep. No. 1609, 94th Cong., 2d Sess. 12 (1976)).

In drafting Section 636(b)(3), Congress wrote broadly. The only limitations on the authority of courts to assign matters to magistrates are those posed by "the Constitution and laws of the United States." In order to prevail before this Court, petitioners must therefore point to some "law" or constitutional provision that bars the delegation of jury selection to magistrates.[7]

To that end, petitioners argue (Br. 25-27) that Fed. R. Crim. P. 24 and the Jury Selection and Service Act of 1968, 28 U.S.C. 1861 *et seq.*, prohibit a magistrate from

[7] If the Court concludes that jury selection is a "pretrial matter," within the meaning of Section 636(b)(1)(A), petitioners are left only with their constitutional claim. While delegations under Section 636(b)(3) cannot be made if they are "inconsistent with the * * * laws of the United States," delegations pursuant to Section 636(b)(1) are permitted "[n]otwithstanding any provision of law to the contrary." As petitioners implicitly concede (Br. 27), the presence of that language in paragraph (1) removes any possible argument based on any "laws of the United States" other than the Constitution.

conducting *voir dire* and thus limit the scope of Section 636(b)(3). Petitioners' reliance on these "laws" is misplaced, however, because neither precludes a magistrate from conducting *voir dire* at a judge's request.

Section 1867(a) of the Jury Selection and Service Act, on which petitioners rely (Br. 26-27), simply describes the procedures that must be followed in bringing a challenge to the selection of a grand or petit jury on the ground of noncompliance with a provision of the Act. The statutory provision nowhere intimates that only a district judge may conduct *voir dire*; nor does it even suggest that a magistrate could not consider a statutory challenge to jury selection procedures at a judge's request.

Rule 24 likewise does not purport to address the lawfulness of magistrate-conducted *voir dire*. It states that a court "may" permit the defendant or his counsel to conduct *voir dire* and that a court "may" conduct the examination "itself." Rule 24 does not bar a district judge from asking the magistrate to conduct *voir dire*, nor does it otherwise indicate that the judge must be present during *voir dire*. Significantly, Rule 24 uses the term "court," not the term "judge," to refer to the officer presiding over the jury selection process. The term "judge" is the term that is "used in the rules to indicate that only a judge (not to include a United States magistrate) is authorized to act." Notes of the Advisory Committee accompanying 1972 amendment to Rule 54. The use of the term "court" is therefore consistent with the performance of duties by either a judge or a magistrate.

Even if Rule 24 could be read to provide that only a judge may conduct *voir dire*, Rule 24 is not a "law[] of the United States," within the meaning of Section 636(b)(3). While a court rule has been found in another context to constitute a "law of the United States," see *United States*

v. *Hvass*, 355 U.S. 570, 575 (1958),[8] court rules ordinarily do not have that status, and the language of the Magistrates Act itself supports the view that that general principle applies in this context. Section 636(a)(1) provides that each magistrate shall have "all powers and duties conferred or imposed upon United States commissioners *by law or by the Rules of Criminal Procedure for the United States District Courts*" (emphasis added). The statutory juxtaposition strongly suggests that, for purposes of Section 636, Congress did not intend to equate "law" with the Federal Rules of Criminal Procedure, including Rule 24.

B. The legislative history of the enactment of the Magistrates Act in 1968 and its amendment in 1976 does not provide a clear answer to whether *voir dire* is a "pretrial matter," within the meaning of Section 636(b)(1), rather than an "additional dut[y]," within the meaning of Section 636(b)(3). But the history leaves no doubt that, however denominated, the conduct of *voir dire* falls within one of those two categories and can therefore properly be delegated to a magistrate under the Act. Indeed, the legislative history shows that the very reason Congress amended the Act in 1976 was to overcome the type of crabbed construction now advanced by petitioners. It also shows

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[8] In *Hvass*, the Court concluded that an attorney who made a willfully false statement while under oath pursuant to a local federal court rule was subject to criminal prosecution for perjury. The Court reasoned that "[t]he phrase 'a law of the United States,' as used in the perjury statute, is not limited to statutes, but includes as well Rules and Regulations which have been lawfully authorized and have a clear legislative base" (355 U.S. at 575).

that Congress was repeatedly made aware that jury selection was among those tasks being performed by magistrates, and that Congress sought to expand, rather than restrict, the functions magistrates could perform.

1. Relying on *Holy Trinity Church* v. *United States*, 143 U.S. 457 (1892) (see Br. 13), petitioners argue that the structure and legislative history of the Magistrates Act trump what might otherwise appear to be the plain meaning of the statute. According to petitioners (Br. 12-22), the structure and history of the Act show that Congress considered jury selection an "integral part" of a "felony trial," which Congress specifically excluded from magistrate jurisdiction, and that, notwithstanding the sweeping terms of the Act, Congress intended to restrict a magistrate's "additional duties" to "routine nonjudicial burdens" and "nonadjudicative tasks." The Act's structure and legislative history, however, support neither assertion.

To be sure, Congress did not intend to authorize magistrates to conduct felony trials. The Act makes that clear by explicitly giving magistrates the authority to try, with the parties' consent, both misdemeanor offenses and civil matters, but not felony offenses (see 18 U.S.C. 3401(a), 28 U.S.C. 636(c)).[9] But there is no suggestion in the statute or legislative history that Congress considered jury selection to be part of the felony trial for these purposes and thus intended to bar magistrates from conducting *voir dire*.

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[9] The legislative history makes that point clear as well. See, *e.g.*, H.R. Rep. No. 1629, 90th Cong., 2d Sess. 20-22 (1968); S. Rep. No. 371, 90th Cong., 2d Sess. 29-33 (1968); H.R. Rep. No. 287, 96th Cong., 1st Sess. 2, 17 (1979); S. Rep. No. 74, 96th Cong., 1st Sess. 5-7, 17 (1979).

Petitioners' assumption that Congress considered *voir dire* to be part of trial is a flaw that runs throughout their brief and infects their entire presentation. For example, petitioners assume (Br. 24) that magistrates were unable to conduct *voir dire* in misdemeanor cases in 1976 because the statute then "required misdemeanor defendants to waive their right to a jury trial in order to be tried by a magistrate." The fact that magistrates could not preside over misdemeanor jury trials in 1976, however, does not compel the conclusion that they could not then conduct *voir dire* for misdemeanor trials. Hence, petitioners are wrong in concluding (Br. 24) that "if the court of appeals is correct, Congress in 1976 authorized magistrates to select felony juries over the defendant's objection, but prohibited magistrates from selecting misdemeanor juries with the defendant's consent." There is no such anomaly because the magistrates could select misdemeanor juries with or without the defendant's consent in 1976; they simply were unable to preside over the jury trial itself.

At bottom, petitioners' statutory argument rests on their assertion (Br. 16-18) that Congress's failure to refer specifically to jury selection in Section 636(b)(1) conclusively shows that Congress did not intend to confer such authority on magistrates. Thus, petitioners argue (Br. 16) that Congress failed "to provide any framework for district court review of magistrate-conducted felony jury selection." Petitioners' reasoning is flawed, however, because, as both the language and legislative history make clear, Congress did not purport to list in Section 636(b)(1) all those specific "pretrial matters" that could properly be delegated to a magistrate. Congress instead referred broadly to "any" pretrial matter, and it clearly intended flexibility rather than rigidity to be the touchstone for the statute's implementation. See, *e.g.*, *Jurisdiction of United*

States Magistrates: Hearing on S. 1283 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 94th Cong., 1st Sess. 35 (1975) [hereinafter *1975 Senate Hearings*] (report of Judicial Conference) (pretrial provisions "broadly worded to authorize the maximum use of magistrates prior to trial").

Hence, the absence of any "framework for the district court review" of magistrate-conducted jury selection is not significant. Section 636(b)(1) generally establishes two different schemes for district courts to review magistrates' rulings on pretrial matters. The standard of review and the procedure followed depend on the nature of the pretrial matter at issue. In the case of eight specifically listed dispositive pretrial matters, a district judge must exercise "de novo determination." In all other cases, a district judge "may reconsider any pretrial matter * * * where it has been shown that the magistrate's order is clearly erroneous or contrary to law" (28 U.S.C. 636(b)(1)(A) & (C)).

In this case, of course, the district court exercised de novo review of the magistrate's jury selection decisions. Contrary to petitioners' assertions (Br. 17 & n.10), however, the court's use of de novo review did not violate the Act. The Act provides only for a minimum standard of review; it does not prohibit a district court from exercising more extensive supervision of the magistrate's work.[10] Indeed, in light of the constitutional claims raised in this case, the district judge's decision to exercise de novo review was prudent.

[10] Section 636(b)(4) also specifically authorizes district courts to "establish rules pursuant to which the magistrates shall discharge their duties," which can include adjustments in the standard of review for particular functions.

2. Nor is there any merit to petitioners' contention (Br. 19-22) that the legislative history shows that Congress intended to restrict those "additional duties" that are delegable under Section 636(b)(3) to "routine nonjudicial burdens" and "nonadjudicative tasks." Congress included the "additional duties" language in the original version of the statute, the Federal Magistrates Act of 1968, Pub. L. No. 90-578, § 101, 82 Stat. 1107, 1113 (1968).[11] Sponsors of the legislation and witnesses who appeared before House and Senate Committees repeatedly declared that the "additional duties" provision should provide a broad grant of authority to district courts to delegate tasks.[12]

[11] As originally enacted, the Magistrates Act enumerated three duties that district courts could assign to magistrates: serving as a special master; assisting a district court in pretrial matters in civil and criminal actions; and preliminarily reviewing applications for post-trial relief in criminal cases. The Act expressly stated, however, that magistrates were not restricted to those functions. See Pub. L. No. 90-578, § 101, 82 Stat. 1107, 1113 (1968).

[12] For instance, Senator Tydings, the author of the Act and its principal Senate sponsor, told the House subcommittee that was considering the legislation that "[w]e wanted to make it clear that magistrates are available to the courts to serve in *any* capacity not in conflict with the Constitution or the laws of the United States, as an officer of the district court." *Federal Magistrates Act: Hearings on S. 945, etc., Before Subcomm. No. 4 of the House Comm. on the Judiciary,* 90th Cong., 2d Sess. 87 (1968) [hereinafter *1968 House Hearings*] (emphasis added). See *Federal Magistrates Act: Hearings on S. 3475 and S. 945 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. and 90th Cong., 1st Sess. 14 (1966-1967) [hereinafter *1966-1967 Senate Hearings*] (remarks of Sen. Tydings) ("[I]t is appropriate to allow the district court to make whatever use of [the magistrates'] services as it sees fit, in addition to the functions that the statute assigns them."); *id.* at 196 (testimony of Hon. Talbot Smith) ("[I]t would be helpful to the district judges to have a wide leeway in their authorization of the use of magistrates."); *id.* at 52 (testimony of Hon. Edward S. Northrup) (The Act is "flexible enough to be capable of being adjusted to almost any situation that might exist.").

Congress's purpose was to allow district judges to experiment and use magistrates in imaginative and innovative ways not yet foreseen by Congress. See S. Rep. No. 371, 90th Cong., 2d Sess. 26-27 (1968) ("If district judges are willing to experiment with the assignment to magistrates of other functions in aid of the business of the courts, * * * there will be increased time available to the judges for the careful and unhurried performance of their vital and traditional adjudicatory duties, and a consequent benefit to both efficiency and the quality of justice in the Federal courts.").

Congress evinced no intention to limit the experimentation with the use of magistrates to "routine, nonjudicial burdens." That had been the restricted scope of tasks assigned to the United States commissioners under the pre-1968 system that Congress sought to abolish (see S. Rep. No. 371, *supra*, at 10-11). While those same responsibilities remained assignable to magistrates pursuant to Section 636(a)(1), a primary purpose of the 1968 law was to create new "judicial responsibilities" for magistrates and thereby attract "high-caliber talent" to the position. See 114 Cong. Rec. 27,341 (1968) (remarks of Rep. Poff); *id.* at 29,407 (remarks of Sen. Tydings) ("By raising the standards of the lower judicial office by making the position more attractive to highly qualified individuals, and by increasing the scope of the responsibilities that can be discharged by that office, the bill establishes a system capable of increasing the overall efficiency of the Federal judiciary by relieving the district courts of some of their minor burdens * * *."); see also H.R. Rep. No. 1629, *supra*, at 10 ("the jurisdiction exercised by the magistrate is the jurisdiction of the court itself"); S. Rep. No. 371, *supra*, at 27 ("magistrate * * * is in fact exercising the jurisdiction and powers of the district court as an officer of that court"); *1966-1967 Senate Hearings* 27 (remarks of Sen. Tydings); *1968 House Hearings* 81 (testimony of Sen. Tydings); *id.* at 128 (testimony of Asst. Dep. Attorney General William T. Finley).[13]

The legislative history of the 1976 amendment of the Magistrates Act is to the same effect. The purpose of that legislation was to amend Section 636(b) "in order to clarify and further define the additional duties which may be assigned to a United States Magistrate in the discretion of a judge of the district court" (H.R. Rep. No. 1609, 94th Cong., 2d Sess. 2 (1976)).[14] Both the House and Senate Reports stressed, in particular, that the purpose of subsection (b)(3) was to "enable[] the district courts to continue innovative experimentations in the use of this judicial officer" (H.R. Rep. No. 1609, *supra*, at 12; S. Rep. No. 625, 94th Cong. 2d Sess. 10 (1976)). For that reason, Congress placed the "additional duties" provision "in an entirely separate subsection [to] emphasize[] that it is not restricted in any way by any other specific grant of authority to magistrates" (H.R. Rep. No. 1609, *supra*, at 12; S. Rep. No. 625, *supra*, at 10). Congress also criticized some district courts for not having made extensive use of magistrates since the passage of the Magistrates Act in

[13] Petitioners' reliance on Rep. Poff's statement in 1968 that the "additional duties" provision "was not in any way intended as the predicate for expanding the jurisdiction of the magistrate," is misplaced (Pet. Br. 19, quoting 114 Cong. Rec. 28,360-28,361 (1968)). Rep. Poff was referring only to the power of a magistrate "to *decide a case* outside of the minor offense jurisdiction created by this bill" (*id.* at 28,360 (emphasis added)). But in any event, it is clear that the 1976 amendments were intended to avoid just the type of narrow construction petitioners propound.

[14] Congress amended the Act in 1976 partly in response to this Court's decision in *Wingo* v. *Wedding*, 418 U.S. 461 (1974) in which the Court held that the "additional duties" provision in effect at that time did not authorize a district judge to assign magistrates responsibility for holding evidentiary hearings on habeas corpus petitions. Congress intended to overrule that ruling through the 1976 amendments. See H.R. Rep. No. 1609, *supra*, at 5; S. Rep. No. 625, *supra*, at 3-4; *United States* v. *Raddatz*, 447 U.S. at 674.

1968 (see H.R. Rep. No. 1609, *supra,* at 4; S. Rep. No. 625, *supra,* at 3; *1975 Senate Hearings* 33 (report of Judicial Conference)).

The legislative reports, hearings, and debates preceding the 1976 amendments, like those held prior to the passage of the Magistrates Act in 1968, refute petitioners' contention (Br. 19) that Congress intended to assign magistrates only "routine, nonjudicial burdens" and "nonadjudicative tasks." They show that Congress expected magistrates, under the supervision of district judges, to undertake "adjudicatory function[s]" and "very important judicial duties." See *United States* v. *Raddatz,* 447 U.S. at 681 n.8 (citing S. Rep. No. 625, *supra,* at 6, and H.R. Rep. No. 1609, *supra,* at 8) ("permitting the exercise of an adjudicatory function by a magistrate"); *1975 Senate Hearings* 1 (remarks of Sen. Burdick) ("[T]he declared objective of the Congress when it passed the Magistrates Act of 1967, was to create in the magistrate a judicial officer who could perform various judicial duties * * *."); *id.* at 5 (testimony of Hon. Charles M. Metzner) ("Under authority of section 636(b), magistrates are presently performing very important judicial duties for the district courts.").

Petitioners make much (Br. 22-25) of their claim that Congress failed in 1976 "to override the existing practice that district judges always presided at jury selection." Absent affirmative evidence of an intent to alter the status quo, petitioners argue, the statute must be construed not to permit magistrates to conduct jury selection.

That argument rests on a false premise. When Congress amended the Magistrates Act in 1976, magistrate-conducted *voir dire* was already an accepted feature of practice under the Act; indeed, it was the very type of experimental and innovative use of magistrates that the framers of the Act sought to encourage.

The first year of full nationwide implementation of the magistrates system, 1972, "was one of transition in which judges experimented with the use of magistrates." See *Administrative Office of the United States Courts, Ann. Rep.* 250 (1972). That year the Judicial Conference's Committee on the Administration of the Federal Magistrate System authorized a subcommittee to study the conduct of *voir dire* by magistrates. The subcommittee, which issued its report in July 1973, found that 9 district courts out of the 87 that responded had, in varying degrees, already authorized magistrates to conduct *voir dire.*[15] See Judicial Conference, Report of the Subcommittee Assigned to Study the Conduct of Voir Dire by Federal Magistrates 2-4 (1973) [hereinafter *Voir Dire* Report].[16] Today, 51 dis-

[15] At least two of the four districts that did not respond, the Eastern and Middle Districts of Louisiana, did have local rules at the time permitting a magistrate to "conduct voir dire examination and impanel trial juries" (See *Magistrate System: Hearing Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary,* 92d Cong., 2d Sess. 81 (1972) (copy of local court rules for Eastern District of Louisiana appended to prepared testimony of Harry Lee, Chairman of Legislative Comm. of Federal Magistrates); Local Rules for the Middle District of Louisiana, Rule 26(c)(5)(i) (effective April 16, 1972).

[16] A copy of the report has been lodged with the Court. The report's survey found (pages 3-4) that the districts allowed magistrate-conducted *voir dire* in differing circumstances; Central California, Oregon, and Western Michigan (only in emergency circumstances) allowed magistrate-conducted *voir dire* in both civil and criminal cases; the District of Columbia and Northern Iowa similarly authorized magistrates to conduct *voir dire* in civil and criminal cases, but only with the written consent of the parties; Western Kentucky and Eastern Texas permitted magistrate-conducted *voir dire* only in civil cases; Arizona allowed the practice only in civil cases with the parties' consent, but then contemplated that a similar rule would be adopted for criminal cases; and in Western Pennsylvania a clerk conducted *voir dire* in civil cases and one judge permitted the magistrate to conduct *voir dire* in criminal cases so long as the judge ruled on all legal issues. While the subcommittee questioned the practical value of magistrate-conducted *voir dire,* it explicitly did "not recommend that those districts which have adopted rules or followed the practice of having magistrates conduct voir dire examination of jurors repeal the

tricts have local court rules that expressly provide magistrates with unqualified authority to conduct *voir dire* in civil and criminal cases;[17] 5 districts provide such au-

rules or abandon the practice" (*Voir Dire Report* 9). The subcommittee did suggest, however, that those districts just beginning to experiment with magistrate-conducted *voir dire* limit the practice to civil cases with the consent of the parties (*ibid.*). The subcommittee further recommended that there be "some provision for the district judge to review the rulings of the magistrate which are objected to * * * [e]specially * * * if the rule or practice is to be employed in criminal cases" (*ibid.*). The Judicial Conference's Committee on the Operation of the Jury System accepted the Report in September 1973; the minutes of the review of the subcommittee's report by the Judicial Conference's Committee on the Administration of the Federal Magistrates Act "expressed no objection" to magistrate-conducted *voir dire* in civil cases with the parties' consent and made no comment on the practice in other circumstances, including criminal cases. None of these documents (copies of which have been lodged with the Court) questions the legality of magistrate-conducted *voir dire* under the Act. Significantly, however, immediately following passage of the 1976 legislation, the Judicial Conference's Magistrates Committee distributed a memorandum that provided, without limitation, that magistrates could conduct *voir dire* (see pages 25-26 & note 22, *infra*).

[17] See N.D. Ala. Mag. R. 4(f); S.D. Ala. R. 26(1)(i)(6); C.D. Cal. Mag. R. 1.76; E.D. Cal. R. 303(2); N.D. Cal. R. 405(g); S.D. Cal. R. 501-8(f); D. Col. R. 303(2); D. Del. Mag. R. 1(i)(6); D. D.C. R. 501(b)(6); M.D. Fla. R. 6.01(c)(20); N.D. Fla. R. 24(J)(2)(c)(1); S.D. Fla. Mag. R. 1(i)(6); S.D. Ga. R. 21.5; D. Haw. R. 401-8(f); D. Idaho R. 4-101(j)(6); C.D. Ill. R. 3(a)(14); S.D. Ill. R. 29(i)(6); N.D. Ind. R. M-1(i)(9); S.D. Ind. R. M-13; N.D. Iowa R. 31(j)(4); S.D. Iowa R. 31(j)(4); D. Kan. R. 601(i)(6); E.D. La. R. 20.7(f); M.D. La. R. 26(1)(i)(5); W.D. La. R. 28(a)(9)(e); E.D. Mich. R. C-i(j)(6); W.D. Mich. Mag. R. 1(h)(5); D. Minn. R. 16(E)(5); W.D. Mo. R. 22(K)(6); D. Neb. R. 44(I)(6); D. Nev. R. 500-9(f); D.N.H. Mag. R. D(3); D. N.J. R. 40(A)(5); E.D.N.C. R. 62.09(f); M.D.N.C. R. 401(b)(4); D. N.D. R. 28(c)(4); N.D. Ohio R. 19.10(2); S.D. Ohio (W. Div'n) R. 1(1)(6); E.D. Pa. R. 7(i)(6); M.D. Pa. R. 901.9(a)(7); W.D. Pa. Mag. R. 6(e); D. P.R. R. 506.6; D. R.I. R. 32(e)(5); E.D. Tenn. R. 21.2(d); M.D. Tenn. R. 601(a)(2); W.D. Tenn. R. 17(i)(6); D. Vt. Mag. R. 1(A)(IX)(a)(iv); W.D. Wash. Mag. R. 9(d); N.D. W.Va. R. 4.01(i)(6); S.D. W.Va. Mag. R. 1(i)(6); E.D. Wis. R. 13.06(d).

thority with some limitations;[18] and 18 districts, including the district involved in this case (the Eastern District of New York), do not specifically list *voir dire* as a duty for magistrates, but instead generally provide in the local rules that magistrates may exercise all powers and perform all duties conferred on them by Section 636.[19]

When Congress amended the Magistrates Act in 1976, it was aware that magistrates were conducting jury selection. On at least seven different occasions between the passage of the Magistrates Act in 1968 and its amendment in 1976, including during the hearings that led directly to the 1976 legislation, Congress was notified that magistrates were conducting jury selection, including *voir dire*.[20] Congress

[18] D. Alaska R. 3(2) (consent of parties); D. Ariz. R. 18(d)(6) (same); N.D. Okla. R. 32(B)(12) (civil cases); W.D. Okla. R. 39(B)(12) (same); E.D. Wash. 8(d) (same).

[19] See M.D. Ala. R. 32(c); D. Conn. Mag. R. 1; N.D. Ill. R. 1.70(A); E.D. Ky. R. 18(a); W.D. Ky. R 18(a); D. Me. R. 8(c); E.D. Mo. R. 21; D. Mont. R. 400-1; D. N.M. R. 27(a); E.D.N.Y. Mag. R. 1; S.D.N.Y. Mag. R. 1; S.D. Ohio R. 2.4.1 (except Western Div'n); E.D. Okla. R. 32; D. Or. R. 135-1(b); D. S.C. R. 19.01; E.D. Tex. R. 15; S.D. Tex. R. 15(A); E.D. Va. R. 29(N).

[20] See *1975 Senate Hearings* 39 (testimony of Chief Judge Robert C. Belloni); *id.* at 20 (testimony of Morey L. Sear, Chairman of the Leg. Comm. Nat'l Council of U.S. Magistrates) 20 (indicating preference for amendment of the law or further legislative history to "make clear the authority of magistrates to select juries * * *"); Comptroller General, Report to Congress, *The U.S. Magistrates: How Their Services Have Assisted Administration of Several District Courts; More Improvements Needed, reprinted in Improvement of Judicial Machinery: Hearings Before Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. 391 (1975) (duties of magistrate in Oregon district court include "presiding over the selection of juries in

expressed no objection on any of these occasions. Instead, on one occasion Congress appears to have expressed its general support for the practice.

The expression of congressional support occurred following the testimony of Chief Judge Robert C. Belloni of the District of Oregon in 1975 before the Senate subcommittee responsible for the magistrates bill that passed in 1976. Judge Belloni told the subcommittee that magistrates had increased the efficiency of his district by, among other things, "presid[ing] over the *voir dire* and jury selection of a trial to begin momentarily before a judge who is putting the finishing touches on his current case" (*1975 Senate Hearings* 39). The House and Senate Reports both selected Judge Belloni's testimony for special praise in their discussion of the scope of a magistrate's intended authority under the Act; they referred to his testimony and stated that "[a] similar scope of additional

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both civil and criminal cases"); *The Omnibus Judgeship Bill: Hearing Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 413 (1973) (testimony of Judge Joe J. Fisher) ("I use [the magistrate] to select juries, which I think is a very good use for a magistrate. You can get consent from the attorneys to use them in this way, and it is a saving of the court's time."); *id.* at 518 (testimony of Chief Judge Robert C. Belloni) (magistrate "presides at jury selections"); *Magistrate System: Hearing Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 92d Cong., 2d Sess 81 (1972) (copy of local court rules for Eastern District of Louisiana appended to prepared testimony of Harry Lee, Chairman of Leg. Comm. of Federal Magistrates) ("The United States Magistrates * * * shall perform the following additional duties as and when assigned to them by any Judge in this District: * * * * * Conduct voir dire examination and impanel trial juries."); *Administrative Office of the United States Courts, Ann. Rep.* 250 (1972) ("Some of the other duties being performed by magistrates in various district courts include the following: * * * * * Presiding over the selection of juries in civil cases, including voir dire examination.").

duties is intended for magistrates under the provisions of [the bill]" (S. Rep. No. 625, *supra*, at 7; H.R. Rep. No. 1609, *supra*, at 9).[21]

C. Petitioners' narrow interpretation of the Magistrates Act is also suspect because it is contrary to the contemporaneous views expressed by the Judicial Conference's Committee on the Administration of the Federal Magistrate System and the Administrative Office of the United States Courts. Only two weeks after the passage of the 1976 amendments, the Judicial Conference's Magistrates Committee distributed to all federal judges and magistrates a "Jurisdictional Checklist" listing those "duties which appear to be appropriate for delegation to magistrates under the new law" (page 1).[22] With respect to "miscellaneous additional duties" under Section 636(b)(3),

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[21] Petitioners' attempt (Br. 24 n.15) to diminish the significance of Judge Belloni's testimony is unsuccessful. First, the judge's discussion is not "ambiguous" (*ibid.*). It includes no reference to "civil cases," as suggested by petitioners (*ibid.*). Nor does the qualification that magistrates can act only where "lawyers stipulate" apply to his discussion of *voir dire*. That qualification relates to a different subject – the circumstance of a magistrate "presid[ing] over the jury or nonjury trial exactly as if he were a judge" (*1975 Senate Hearings* 39). Finally, petitioners get no comfort from the fact that the favorable mention of Judge Belloni's testimony occurs under the heading "pretrial matters." As previously explained, although there is some ambiguity concerning whether Congress considered *voir dire* to be a "pretrial matter" rather than just as an "additional dut[y]," what remains clear is that Congress intended, one way or the other, to allow district judges to delegate that task to magistrates. In any event, although the relevant discussion occurs under the "pretrial" heading, both reports state that "[a] similar scope of *additional duties* is intended for magistrates under the provisions of [the bill]" (S. Rep. No. 625, *supra*, at 7 (emphasis added); H.R. Rep. No. 1609, *supra*, at 9).

[22] A copy of that memorandum, dated November 5, 1976, has been lodged with this Court.

the checklist includes "[c]onduct of *voir dire* and selection of juries for district judges" in its list of duties that "to the extent that [they] * * * are not covered by subsection 636(b)(1) * * * they may be delegated to a magistrate under subsection 636(b)(3)" (page 12). The Administrative Office's *Legal Manual for United States Magistrates* [hereinafter *Magistrates Manual*] takes the identical view (Vol. 1, § 3.09, at page 3-15).[23] The Manual does not restrict *voir dire* to civil cases or to cases where the parties have consented. The Manual also includes a set of model local court rules that, in the list of "other duties" of a magistrate, authorize a magistrate to "[c]onduct voir dire and select petit juries for the court" (*Magistrates Manual* 3-49 to 3-50).[24]

The views of the Judicial Conference's Committee on Magistrates and of the Administrative Office are entitled to significant weight. Pursuant to congressional design,

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[23] Petitioners argue that the views of the Manual should be discounted in this respect because it is "difficult to reconcile" the Manual's acknowledgment (at page 3-19) that magistrates cannot try felony cases "with the manual's approval of *voir dire* delegation, unless such approval was meant to apply only to civil cases" (Pet. Br. 18 n.11). Petitioners' mistake, which is repeated throughout their brief, is their unstated assumption that *voir dire* is part of the felony jury trial itself. As is made clear, however, by the very provisions upon which petitioners rely, the Manual does not consider *voir dire* to be part of the trial itself. Hence, the Manual is not internally inconsistent.

[24] To be sure, a foreword to the Manual points out that it "is designed merely to be a guide and a readily available reference work" and "is not an official directive from the Judicial Conference of the United States or the Administrative Office or a substitute for decisional law * * *" (*Magistrates Manual* iii). Nonetheless, the Manual is instructive, because it reflects the interpretation of the Act by Judicial Branch officers intimately familiar with its origins and administration.

the Judicial Conference and the Administrative Office "share the common purpose of providing for the fair and efficient fulfillment of responsibilities that are properly the province of the Judiciary." *Mistretta* v. *United States*, 109 S. Ct. 647, 663 (1989). They worked closely with Congress in its consideration of the magistrates legislation, both when the statute was originally enacted in 1968 and when it has since been amended. They also have significant official responsibilities under the Act and related federal laws.[25] Not surprisingly, therefore, both the Senate and House Reports and various individual legislators relied on the Judicial Conference's support in advocating the legislation. See, *e.g.*, H.R. Rep. No. 1609, *supra*, at 13; S. Rep. No. 625, *supra*, at 11; 122 Cong. Rec. 35,181 (1976) (remarks of Rep. Danielson); *1975 Senate Hearings* 30 (remarks of Mr. Westphal, Subcommittee Chief Counsel); S. Rep. No. 371, *supra*, at 9; 114 Cong. Rec. 27,227 (1968) (remarks of Rep. McClory); *id.* at

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[25] As petitioners acknowledge (Br. 23), the Judicial Conference initially proposed the legislation that, with some modification, passed Congress in 1968 and 1976. Representatives of the Conference also testified at the hearings on the legislation and filed reports with the relevant congressional committees on the bills under consideration. See, *e.g.*, *1975 Senate Hearings* 4 (testimony of Judge Charles M. Metzner, Chairman of Judicial Conference's Magistrates Committee); *id.* at 33-40 (report of Judicial Conference on legislation); *1966-1967 Senate Hearings* 241j-244 (report of Judicial Conference on legislation). Finally, the Judicial Conference and the Administrative Office, under the Conference's supervision, each has significant responsibilities under the Act and related laws; for instance, the Judicial Conference must promulgate standards and procedures for the appointment of magistrates (28 U.S.C. 631(b)(5)); the Director of the Administrative Office must determine the number, locations, and salaries of magistrates (28 U.S.C. 633); and the Director must prepare a manual for the use of magistrates "set[ting] forth their powers and duties" (28 U.S.C. 604(d)(4)).

27,342 (remarks of Rep. Poff). Particularly in light of Congress's reliance on the Conference and the Administrative Office, this Court may appropriately give weight to their interpretation of the statute, which is at odds with that of petitioners. See *United States* v. *Peacock*, 761 F.2d 1313, 1318 (9th Cir.) (Kennedy, J.), cert. denied, 474 U.S. 847 (1985); *United States* v. *Rivera-Sola*, 713 F.2d 866, 873 (1st Cir. 1983).

II. MAGISTRATES MAY CONDUCT VOIR DIRE WITHOUT OFFENDING ARTICLE III

Petitioners present the Article III challenge to magistrate-conducted *voir dire* in its starkest form. They do not argue that the quality of the *voir dire* they received was inadequate in any way.[26] They do not claim that any prospective juror was wrongly excluded or not excluded for cause. Nor do petitioners contend that they were not allowed full exercise of their peremptory challenges or that the prosecutor abused his right of peremptory challenge.[27] In short, petitioners acknowledge that they were tried and

[26] The transcript of the *voir dire* shows that the *voir dire* was extensive and probing. No doubt for that reason, when given the opportunity by the magistrate, none of petitioners' counsel requested any additional questioning (see 3/9/87 Tr. 124). See Gomez C.A. Br. 37 ("Gomez was not prejudiced by any specific ruling of the magistrate during jury selection and made no such specific complaint to the district judge * * *.").

[27] For the first time in this case, petitioners now intimate (Br. 3 & n.4) that because the magistrate declined to excuse a prospective juror for hardship after she stated that she might need to attend a funeral of a relative, petitioners might themselves have been compelled to exercise a peremptory challenge to excuse that prospective juror. But petitioners made no objection either before the magistrate or the district court to the decision not to excuse the juror. They therefore cannot now complain that the decision not to excuse the juror might have prejudiced them—a claim that is in any event far-fetched.

convicted by an impartial jury before an Article III judge, yet they claim that their convictions must be overturned solely because an Article III judge did not personally conduct the *voir dire*. In petitioner's view, Article III is not satisfied by the subsequent availability of de novo review by the judge.[28]

Article III, however, imposes no such rigid bar on the use of magistrates. Even accepting petitioners' premise that Article III requires the presence of an Article III judge during a federal felony jury trial (see Br. 30-34),[29] Article III's concerns are satisfied in a preliminary proceeding such as *voir dire* by the availability of de novo review on

[28] Petitioners cannot, of course, claim that Article III judges must personally preside over all aspects of jury selection. Otherwise, the well-settled practice of using jury commissioners to aid in the selection of prospective jurors for the array would be unconstitutional. See Jury Selection and Service Act of 1968, 28 U.S.C. 1861 *et seq.*; see also *Fay* v. *New York*, 332 U.S. 261, 271 (1947) (overruled on other grounds in *Taylor* v. *Louisiana*, 419 U.S. 522, 530 (1975)) ("Many of the standards of elimination which the clerk is directed to apply in choice of the panel are those the court would have to apply to excuse a juror on challenge for cause.").

[29] That question is not free from doubt. It is well settled that an Article III judge need not preside over all facets of a federal criminal proceeding, because "the Constitution does not require that all persons charged with federal crimes be tried in Art. III courts." See *Swain* v. *Pressley*, 430 U.S. 372, 382-383 (1977); see *Palmore* v. *United States*, 411 U.S. 389, 402 (1973) ("Very early in our history, Congress left the enforcement of selected federal criminal laws to state courts and to state court judges who did not enjoy the protections prescribed for federal judges in Art. III."). From that premise, it would seem to follow that Article III is not violated when a federal magistrate presides over a jury trial. But see *Northern Pipeline Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 64 n.15 (1982) (plurality opinion). In this case, as in *Raddatz*, however, the Court need not reach that issue, because "Congress has not sought to make any such delegation" (447 U.S. at 681).

the part of the district judge. Virtually all of petitioners' arguments to the contrary were previously rejected by this Court in *United States* v. *Raddatz*, 447 U.S. 667 (1980).

A. In *Raddatz*, the Court considered an Article III challenge to the authority of a magistrate to hear a motion to suppress evidence in a criminal case and to make proposed findings and recommendations to a judge concerning the proper disposition of the motion. Section 636(b)(1) of the Magistrates Act provides that a judge may designate a magistrate to assist the judge in that manner as long as the judge "make[s] a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made."

This Court ruled in *Raddatz* that the delegation of suppression proceedings to a magistrate "does not violate Article III so long as the ultimate decision is made by the district court" (447 U.S. at 683). The Court emphasized that "the entire process takes place under the district court's total control and jurisdiction" (*id.* at 681). "[T]he magistrate acts subsidiary to and only in aid of the district court" (*ibid.*). Justice Blackmun, concurring, emphasized that because "the magistrate himself is subject to the Art. III judge's control[], • • • the only conceivable danger of a 'threat' to the 'independence' of the magistrate comes from within, rather than without, the judicial department" (*id.* at 685). Whenever "a controversial matter might be delegated to a magistrate who is susceptible to outside pressures, the district judge—insulated by life tenure and irreducible salary—is waiting in the wings, fully able to correct the error" (*id.* at 686 (Blackmun, J., concurring)).

The Court's reasoning in *Raddatz* applies with equal force to the authority of a magistrate to conduct *voir dire*. Here, as in *Raddatz*, de novo review of the magistrate's determinations is available. Hence, "the ultimate decision

is made by the district court" (447 U.S. at 683). The judge in both instances retains "plenary discretion whether to authorize a magistrate to [conduct *voir dire*] and • • • the magistrate acts subsidiary to and only in aid of the district court" (*id.* at 681). In short, as Article III requires, " 'the essential attributes' of judicial power are retained in the Art. III court." See *Northern Pipeline Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 81 (1982) (plurality opinion), quoting *Crowell* v. *Benson*, 285 U.S. 22, 51 (1932).[30]

None of the grounds asserted by petitioners for distinguishing this case from *Raddatz* is persuasive. First, petitioners argue (Br. 35) that *voir dire* can be distinguished from a motion to suppress evidence on the ground that "no distinction under Art[icle] III can be drawn between jury selection and the evidence phase of the trial." In fact, an obvious distinction can be drawn: The evidence phase occurs during the trial itself before an impartial jury and determines the innocence or guilt of the accused, while *voir dire* is not part of the presentation of competing versions of facts that is ordinarily considered to constitute the "trial."

Although petitioners suggest that the impact of suppression rulings on the "evidence phase of the trial" is more

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[30] In addition, as Judge Rubin noted, dissenting in *United States* v. *Ford*, 824 F.2d 1430, 1446-1447 (5th Cir. 1987), cert. denied, 108 S. Ct. 741 (1988), it is far from clear that judges have historically been physically present during *voir dire*: "Centuries ago, under the common law of England, • • • court decisions indicate that it was not remarkable for challenges for cause to be tried to and decided by panels of other jurors rather than by the judge, and that such challenges may have been tried outside the presence of the judge" (*ibid.* (footnotes omitted)). See 9 W. Holdsworth, *A History of English Law* 183 (3d ed. 1944); J. Thayer, *A Preliminary Treatise on Evidence at the Common Law* 123-124 (1898); Moore, *Voir Dire Examination of Jurors: I. The English Practice*, 16 Geo. L.J. 438, 442-443 (1928); see also *Hopt* v. *Utah*, 110 U.S. 574, 577 (1884).

remote than the impact of *voir dire*, the converse would seem true. The disposition of a motion to suppress evidence determines what evidence can be admitted at trial. As a practical matter, "the resolution of a suppression motion can and often does determine the outcome of the case" (*Raddatz*, 447 U.S. at 677-678). Jury selection is, of course, an important procedure but it is hard to credit petitioners' suggestion that the *voir dire* of the prospective jurors is typically more important to the resolution of a criminal case than a motion to suppress evidence. Moreover, petitioners are not here contending that the magistrate's role led to a jury that was biased against them. The most that can be said is that the magistrate's decisions may have produced an unbiased jury with a different composition from the unbiased jury that may have been produced if the district judge had presided over the *voir dire*. And the effect of being tried by one impartial jury rather than another is inherently speculative.[31]

Equally unpersuasive is petitioners' assertion (Br. 37-38, 42-45) that *Raddatz* can be distinguished on the ground that *voir dire* examination requires the presence of an Article III judge because meaningful de novo review of *voir dire* proceedings is not possible. A virtually identical argument was made and rejected in *Raddatz*. The Court there acknowledged the potential difficulty of de novo review of suppression hearings, but concluded that, rather than

[31] For this reason, there is no merit to petitioners' suggestion (Br. 36) that *voir dire*, presumably unlike suppression motions, is of "fundamental importance." Both are important. And while *voir dire* implicates the accused's right to trial by an impartial jury, a motion to suppress evidence, depending on the particular constitutional right underlying the motion, may implicate equally fundamental rights, such as those arising under the Fourth, Fifth, or Sixth Amendments. Hence, no valid distinction can be drawn between *voir dire* and suppression motions based on their relative "importance" to the accused.

restrict magistrate authority *ex ante*, the proper course was to assume that courts would be "sensitive to the problems of making credibility determinations on the cold record" (447 U.S. at 679).[32]

The same approach should apply here. While reviewing another's work is never the same as doing the work oneself, it is certainly possible to have effective review of *voir dire* proceedings, just as it is to have effective review of suppression hearings.

To begin with, there are many occasions on which jury selection produces no issue needing review. Unlike suppression motions, which are necessarily won by one side and lost by the other, jury selection often results in both sides being satisfied with the process and the result. Indeed, this appears to be one of those cases, since the parties made no objection either to the substance of the *voir dire* or to the magistrate's decision to seat or excuse particular jurors.[33]

[32] The dissenting justices in *Raddatz* made the same argument petitioners have advanced in this case. See 447 U.S. at 689 (Stewart, J., dissenting) ("It is my view that the judge could not make the statutorily required 'de novo determination' of the critically contested factual issues in this case without personally observing the demeanor of the witnesses."); *id.* at 711 (Marshall, J., dissenting) ("in cases like this one the magistrate's decision is effectively unreviewable if the district judge does not hear the witnesses").

[33] Petitioners repeatedly make much of the fact that the trial judge in this case did not "order or review the *voir dire* transcript" (Br. 3, 9, 44, 48). Because petitioners did not object to the substance of the *voir dire*, including the jurors selected and excluded (see J.A. 18-19), the district court can hardly be faulted for failing to order and review the transcript. For the same reason, petitioners cannot now complain that the scope of de novo review offered by the judge was too narrow. Although the judge spoke most directly to the possibility of de novo review with regard to "any one juror for whom a challenge for cause was not sustained by [the magistrate]," there is no indication that, as

In addition, petitioners exaggerate the relative significance of demeanor in *voir dire* by intimating that it is almost always the crucial factor. As is well illustrated by this case, the *voir dire* process in the federal system consists for the most part of excusing prospective jurors when, in response to a question, they expressly acknowledge their inability to be impartial. See, *e.g.*, 2/9/87 Tr. 21-22 (five prospective jurors raised their hands to declare inability to be impartial in a narcotics trafficking case); *id.* at 43 (The Court: "You feel you would have a problem?"; Ms. Willey: "Yes."); *id.* at 55 (The Court: "Would that experience affect your ability to be fair here?"; Mr. Lederle: "Yes."); *id.* at 57-58 (The Court: "Now, is there anything about the experiences you have just described that would in your mind prevent you from sitting fairly and impartially in this case?"; Ms. Eckelberry: "Yes."); *id.* at 59 (Ms. Ruditsky: "I don't think I would be impartial on this."); *id.* at 73 (Mr. Manigault: "I don't think I can be fair."); *id.* at 74 (The Court: "Anything about the case that would prevent you from being fair?"; Ms. Silverstein: "I think so * * *."); *id.* at 75 (Mr. Bernardo: "I don't think I would be real objective."); *id.* at 94 (Ms. Tavis: "I don't think that I can be impartial in this case."); *id.* at 127 (Mr. Lutz: "I don't feel I have a right to this case."); *ibid.* (Ms. Rozzell: "I do not feel that I can be fair."); *id.* at 131 (Ms. Tufel: "As I sit there, I can tell I am biased.").

Only one prospective juror in this case was excused for cause without making such an explicit disclosure, and that juror was excused after petitioners' counsel explained to the magistrate why bias might be an issue; the government consented to the juror's removal from the panel (see 2/9/87

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petitioners now contend (Br. 3, 44, 48), the judge would have refused to consider any other objection to the *voir dire*.

Tr. 126). Consequently, there was nothing for the district court to review. And even if there had been, the magistrate's decision to excuse one of the prospective jurors for cause could easily have been reviewed on the basis of the transcript.

The parties' exercise of their peremptory challenges in this case, as in most cases, was similarly noncontroversial. One of the important functions of *voir dire* is to allow the parties to hear the prospective jurors' responses and to exercise peremptory challenges based on those responses. As in the case of the disposition of the excuses for cause, the questioning that enlightens the parties' decisions with regard to the exercise of their peremptory challenges can easily be reviewed from the transcript or from the parties' motions to have particular questions asked. None of the parties in this case objected to any question posed by the magistrate or requested any additional questioning. Again, therefore there was nothing for the district court to review. But even if such an objection had been made, the magistrate's determination to ask or not to ask a particular question of the prospective jurors could easily have been reviewed by the district court either in advance or after the fact.

When the need for review of a magistrate's conduct of *voir dire* arises, a district judge possesses considerable discretion in the way he exercises de novo review. How that discretion is exercised depends on the nature of the objection made.

Some review can occur prior to the *voir dire* itself, if the parties submit questions that the magistrate refuses to ask. Other forms of review can take place after the fact or even during the course of the *voir dire*. In most circumstances, the judge will likely find it sufficient to examine the *voir dire* transcript and hear argument by counsel. In some circumstances, however, the judge may decide that it is necessary to question a particular prospec-

tive juror himself; this may occur following the magistrate's jury selection or even during the midst of jury selection, if necessary.[34] And if, as petitioners posit, extreme circumstances arise where the web of errors committed by the magistrate cannot be unwoven, the judge may of course commence the jury selection anew. Cf. H.R. Rep. No. 1609, *supra*, at 3 ("In some specific instances, [it] may be necessary for the judge to modify or reject the findings of the magistrate, to take additional evidence, recall witnesses, or recommit the matter to the magistrate for further proceedings."); *Raddatz*, 447 U.S. at 680 ("broad discretion includes hearing the witnesses live to resolve conflicting credibility claims"). Yet the possibility that in some circumstances the judge may have to redo the magistrate's work in part or in whole does not mean that, on the whole, the delegation of *voir dire* to magistrates will be ineffective in conserving judicial resources. Article III does not forbid a judge from making the judgment that those rarely incurred costs will be more than offset by savings in the vast majority of cases such as this one.[35]

B. Petitioners next contend (Br. 38-39) that magistrate-conducted *voir dire* violates Article III "because the trial judge's conduct of the subsequent trial proceedings

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[34] If an unanticipated controversy arises during jury selection, the magistrate is free to consult with the judge, who may then decide to intervene. In this case, for example, after petitioners' counsel objected to the magistrate's conducting *voir dire*, the magistrate asked counsel whether "some inquiry should be posed to Judge McLaughlin now" (J.A. 15). The magistrate then consulted with the judge and learned that the judge's "view of the law was the same as mine" (J.A. 16).

[35] Even Judge Oakes, dissenting from the court of appeals' judgment, did not conclude that Article III precludes magistrate-conducted *voir dire*. He instead stated that because he did not believe the practice "can save much judicial time," it should generally be prohibited "in the exercise of our supervisory power" (J.A. 48).

depends upon his personal knowledge of what occurred during *voir dire*." But there is no requirement that the same judge both select the jury and conduct the trial, as petitioners appear to concede (Br. 24 n.15). There is therefore no constitutional magic in ensuring that the judge who tries the case has "personal knowledge" of the jury selection process. Consequently, there is no merit to petitioners' claim that in order to achieve that result Article III must be construed to forbid magistrates from conducting *voir dire*.

C. In challenging the use of magistrates to conduct *voir dire*, petitioners understate (Br. 40-42) the adverse impact of their Article III claim on the achievement of the purposes of the Magistrates Act and wrongly ask this Court, under the guise of constitutional review, to second-guess the wisdom of Congress's policy determination. Petitioners argue, in effect, that magistrate-conducted *voir dire* violates Article III because it is infrequently done; according to petitioners (Br. 42), magistrates conducted *voir dire* only 55 times during the last six months of 1988. Petitioners' point is misleading, however, for several reasons.

First, there is reason to believe that the last six months do not reflect the historical, let alone possible future, use of magistrates to conduct *voir dire*. Because of the uncertainty about the legality of the practice following the Fifth Circuit's 1987 decision in *United States* v. *Ford*, 824 F.2d 1430, 1434-1438 (5th Cir. 1987), cert. denied, 108 S. Ct. 741 (1988), it seems likely that the use of magistrates to conduct *voir dire* was atypically low during the six-month survey period on which petitioners rely. The fact that more than half the judicial districts in the nation specifically list *voir dire* as among magistrates' permissible duties suggests that magistrate-conducted *voir dire* has been relatively

common in the past and will be even more common if this Court upholds the practice.

Second, petitioners underestimate the potential significance of their Article III theory. If petitioners are correct in their more sweeping view of the restrictions imposed by Article III on the use of magistrates—that jury selection is part of the trial and an Article III judge must preside over all aspects of federal court trials—more than magistrate-conducted *voir dire* in felony jury trials may be affected. The authority of magistrates to conduct *voir dire* in misdemeanor and civil cases and, even with the defendant's consent, to try misdemeanor or civil cases may also be placed in doubt.[36] According to the Administrative Office of the U.S. Courts, between July 1, 1987, and June 30, 1988, magistrates tried 1348 misdemeanor and 989 civil cases; during the second half of 1988, magistrates conducted *voir dire* in 61 felony jury trials and, apart from cases they tried, conducted *voir dire* in 178 civil cases.[37]

In any event, this Court should decline petitioners' invitation to substitute its own judgment for Congress's policy determination that magistrates are an important and effective means of relieving the burdens of burgeoning caseloads on federal courts. Petitioners argue (Br. 40 n.25, 42) that magistrate-conducted *voir dire* will not save judges much time, but this Court is not equipped to make that empirical determination, even if it is somehow relevant to the legal issue presented here. Experience will show whether the practice is effective, and if it is not, judges will

[36] See, *e.g.*, *Geras* v. *Lafayette Display Fixtures, Inc.*, 742 F.2d 1037, 1045-1054 (7th Cir. 1984) (Posner, J., dissenting) (concluding magistrate-conducted civil trials pursuant to Section 636(c) violate Article III even with the parties' consent).

[37] See Letter from Gerard Jones, Program Analyst, Magistrates Division, Administrative Office of the U.S. Courts (Mar. 30, 1989) (copy lodged with the Court). The 61 felony *voir dire* proceedings represents a modification of the number (55) the Administrative Office provided in its letter to petitioners' counsel.

no doubt abandon it. In the meantime, consistently with Congress's intent, judges should be allowed to continue to experiment with assigning magistrates to various "pretrial matters" and "additional duties," such as *voir dire*, to determine which can most effectively ease the federal courts' dockets. After all, Article III does not require that an experiment be successful in order for it to be constitutional.[38]

D. For the first time, petitioners make an independent argument based on the Due Process Clause (Pet. Br. 46-49).[39] Their due process claim, however, is little more than a reformulation of their Article III claim. The due process right identified by petitioners is the "additional procedural protection" of having "the independence and impartiality of judges" who conduct *voir dire* and criminal trial proceedings "enhanced by life-time tenure and an irreducible salary" (Pet. Br. 46). Apart from the absence of an Article III judge, petitioners do not claim that they suffered any other injury. Petitioners' due process claim therefore suffers from the same infirmities as their Article III claim.[40]

[38] This court rejected a similar argument in *Raddatz*. See 447 U.S. at 702 n.5 (Marshall, J., dissenting) ("Experience shows that motions to suppress evidence consume a relatively small proportion of the time of federal district judges.").

[39] Although petitioners referred to "due process" both in their petitions and in their court of appeals briefs, they did not make a due process argument independent of their Article III claim. See, *e.g.*, 88-5014 Pet. 1, 5; 88-5158 Pet. 7; Supp. Pet. i, 16, 18. The court of appeals, accordingly, addressed only petitioners' Article III argument. See J.A. 30-37.

[40] Petitioners' due process claim surely must fail, moreover, to the extent that petitioners are claiming a due process right to have a judge with life tenure and irreducible salary conduct *voir dire*. If due process required that result, most criminal jury trials in state courts would violate due process. Cf. *Raddatz*, 447 U.S. at 685 n.3 (Blackmun, J., concurring).

This Court rejected a similar due process claim in *Raddatz* (447 U.S. at 677-681). Applying the three-factor test described by this Court in *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976), and now relied upon by petitioners (Br. 47), the Court concluded that any due process rights implicated by a suppression hearing were adequately protected by the statutory provision of de novo review. The same procedural safeguards apply to *voir dire* and therefore lead to the same result.

First, the "private interests implicated" are similar in this case and in *Raddatz* (447 U.S. at 677). Just as "the process due at a suppression hearing may be less demanding and elaborate than the protections accorded the defendant at the trial itself" (*id.* at 679), the process due at *voir dire* is less exacting than at trial. The proceeding is far more informal, and the court has considerable discretion in deciding the substance and format of the questioning. See *Ristaino* v. *Ross*, 424 U.S. 589, 594 (1976).

Second, "the risk of an erroneous determination" is no greater here than it was in *Raddatz*. See 447 U.S. at 677. As in *Raddatz*, "the district court judge alone acts as the ultimate decisionmaker," and "the statute grants the judge the broad discretion to accept, reject, or modify the magistrate's proposed findings" (*id.* at 680). Depending on the nature of the objections made to the magistrate's *voir dire*, the judge also has great discretion in the way he conducts de novo review, ranging from examination of the transcript to questioning prospective jurors himself.

Third, "the public interest and administrative burdens, including the costs that the additional procedures would involve" (*Raddatz*, 447 U.S. at 677) support the constitutionality of magistrate-conducted *voir dire*. Underlying the enactment and subsequent amendments of the Magistrates Act is "Congress' recognition that a multitude of new statutes and regulations had created an avalanche

of additional work for the district courts which could be performed only by multiplying the number of judges or giving judges additional assistance." *Mathews* v. *Weber*, 423 U.S. at 268; see *Wingo* v. *Wedding*, 418 U.S. at 463; S. Rep. No. 625, *supra*, at 2-5; H.R. Rep. No. 1609, *supra*, at 4-7. Congress empowered magistrates to consider "pretrial matters" and undertake "additional duties" so that district judges could spend more time on the trials themselves.

Congress's decision to enlist the aid of magistrates rather than increase the number of district judges reflects a considered fiscal and administrative policy decision. It costs much more to create and annually fund a judgeship than a magistracy. See, *e.g.*, *1975 Senate Hearings* 4 (remarks of Judge Metzner on behalf of the Judicial Conference) ("It is our considered judgment that we cannot continue to cope with this problem [of growing caseloads] by increasing the number of district judges and the supporting staffs of law clerks, secretaries, court clerks, court reporters and other employees, with the concomitant need for huge additional physical space."). Creating a magistrate's position is also a more flexible means of addressing the congestion problem in many instances. A magistrate may be hired part-time and may be readily assigned to different tasks in different courthouses and even different districts as the need arises. See, *e.g.*, H.R. Rep. No. 1609, *supra*, at 9, 12-13.

In light of these factors, Congress's decision to permit magistrates to conduct *voir dire* comports with due process. As this Court explained in another context, "some play in the joints of the jury-selection process is necessary in order to accommodate the practical problems of judicial administration. Congress could reasonably adopt procedures which, while designed to assure that 'an impartial jury [is] drawn from a cross-section of the communi-

ty,' at the same time take into account practical problems of judicial administration." *Hamling* v. *United States*, 418 U.S. 87, 138 (1974).

III. ANY ERROR IN THE PROCEDURE FOLLOWED IN THIS CASE WAS HARMLESS

Petitioners objected to having the magistrate conduct the *voir dire* in this case, but they did not object to, or seek review of, anything the magistrate did in the course of the *voir dire* proceedings. For that reason, even if the district court committed statutory or constitutional error in assigning the *voir dire* to the magistrate, the error was harmless and does not entitle petitioners to a reversal of their convictions.

As this Court has repeatedly stated, most errors that occur in the process leading to a defendant's conviction are subject to harmless error analysis. Thus, the Court has applied harmless error analysis to a wide variety of errors, such as errors in the grand jury process (see *Bank of Nova Scotia* v. *United States*, 108 S. Ct. 2369 (1988)), violations of the Confrontation Clause (see *Delaware* v. *Van Arsdall*, 475 U.S. 673 (1986)), errors in jury instructions (see *Pope* v. *Illinois*, 481 U.S. 497 (1987)), and violations of the right to be present at trial (see *Rushen* v. *Spain*, 464 U.S. 114 (1983)). Only in a few settings has the Court applied a rule of per se reversal upon finding that error has been committed. Those include the complete denial of counsel (see *Perry* v. *Leeke*, 109 S. Ct. 594, 600 (1989)), racial discrimination in the selection of grand jurors (see *Vasquez* v. *Hillery*, 474 U.S. 254 (1986)), and adjudication by a biased judge (see *Tumey* v. *Ohio*, 273 U.S. 510 (1927)).

Petitioners argue (Br. 28-29, 45-46) that the error in this case—permitting an unauthorized officer to conduct the *voir dire*—is a fundamental one that cannot be harmless under any circumstances. We disagree. In at least some cases, of which this one is a clear example, it is possible to

say with great confidence that the assignment of a magistrate to conduct the *voir dire* could not have prejudiced the defendants. In such cases, reversal of the defendants' convictions would be a miscarriage of justice.

The most significant factor bearing on the harmless error issue in this case is that petitioners voiced no complaints about the way the *voir dire* was conducted, other than objecting to the fact that the magistrate conducted it. In the typical harmless error case, the appellant loses if he fails to persuade the court that he would not have been convicted absent the error in question. In this case, petitioners not only cannot make that argument, but they cannot even claim that the *voir dire* or the trial would have been conducted any differently if the judge, rather than the magistrate, had presided over the jury selection process. See *United States* v. *Rodriguez-Suarez*, 856 F.2d 135, 138 (11th Cir. 1988), cert. denied, 109 S. Ct. 875 (1989).

This case is therefore quite different from a case in which the defendant has been denied his right to counsel, but cannot point to any specific error at trial that prejudiced him. As the Court has held, the right to counsel is fundamental, and absent the opportunity to be represented by counsel, a reviewing court cannot have confidence that the result is a fair one, even if no obvious errors appear on the face of the record. See *Chapman* v. *California*, 386 U.S. 18, 23 (1967). In this case, petitioners' counsel represented them throughout the *voir dire* and were invited to call to the attention of the magistrate or the district judge any flaws in the process that they perceived. Since they failed to note any flaws at all, the Court can have confidence that the *voir dire* was properly conducted, or at least that any error was so insignificant as to fall beneath counsel's notice.

An additional factor bearing on the appropriateness of harmless error analysis in this setting is the nature of

appellate review of claims of error in the *voir dire* process. While defendants have a constitutional right to an impartial jury, they do not have a constitutional right to the impartial jury of their choice. For that reason, reviewing courts typically focus on the defendant's "right to reject, not to select a juror," and the loss of a potentially favorable juror is ordinarily not a ground for appeal. See *Hayes* v. *Missouri*, 120 U.S. 68, 71 (1924); *Northern Pac. R.R.* v. *Herbert*, 116 U.S. 642, 646 (1886); *United States* v. *Marchant*, 25 U.S. (12 Wheat.) 480, 482 (1827); see also *Ross* v. *Oklahoma*, 108 S. Ct. 2273, 2277 (1988) ("Any claim that the jury was not impartial * * * must focus * * * on the jurors who ultimately sat. None of those 12 jurors, however, was challenged for cause by petitioner, and he has never suggested that any of the 12 was impartial.").[41]

Petitioners mistakenly assume (Br. 44) that a defendant is entitled to relief whenever a court's action requires that he unnecessarily exercise a peremptory challenge. At least where the relevant statute allowing peremptory challenges so limits that right, a defendant cannot complain even when a court forces the defendant to exercise his last peremptory challenge by erroneously declining to exclude

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[41] Of course, there are exceptions to this general principle. For instance, "a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty (*Witherspoon* v. *Illinois*, 391 U.S. 510, 522 (1968)); and "the Equal Protection Clause forbids the prosecutor to challenge potential jurors soley on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant" (*Batson* v. *Kentucky*, 476 U.S. 79, 89 (1985)). Such issues do not, however, arise in the vast majority of cases (including this one) and, even when they do, they are susceptible to meaningful de novo review by a district judge.

a prospective juror for cause: "So long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated." *Ross* v. *Oklahoma*, 108 S. Ct. at 2278. In sum, the record in this case makes it amply clear that, regardless of the magistrate's authority to conduct the *voir dire*, there was no error in the rulings made in the course of the *voir dire*, and certainly no error that would entitle petitioners to reversal of their convictions and a new trial. Under these circumstances, it would serve no purpose to reverse petitioners' convictions in the absence of any cognizable prejudice to the defense.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. Article III of the United States Constitution provides in relevant part:

> Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.
>
> Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority * * *.
>
> * * * * *
>
> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury * * *.

2. Section 636 of the Federal Magistrates Act provides in relevant part:

> (a) Each United States magistrate serving under this chapter shall have within the territorial jurisdiction prescribed by his appointment –
>
> > (1) all powers and duties conferred or imposed upon United States commissioners by law or by the Rules of Criminal Procedure for the United States District Courts;
> >
> > (2) the power to administer oaths and affirmations, impose conditions of release under section 3146 of title 18, and take acknowledgements, affidavits, and depositions; and

(3) the power to conduct trials under section 3401, title 18, United States Code, in conformity with and subject to the limitations of that section.

(b)(1) Notwithstanding any provision of law to the contrary –

(A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagrah (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

(2) A judge may designate a magistrate to serve as a special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts. A judge may designate a magistrate to serve as a special master in any civil case, upon consent of the parties, without regard to the provisions of rule 53(b) of the Federal Rules of Civil Procedure for the United States district courts.

(3) A magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.

(4) Each district court shall establish rules pursuant to which the magistrates shall discharge their duties.

(c) Notwithstanding any provision of law to the contrary –

(1) Upon the consent of the parties, a full-time United States magistrate or a part-time United States magistrate who serves as a full-time

judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves. Upon the consent of the parties, pursuant to their specific written request, any other part-time magistrate may exercise such jurisdiction, if such magistrate meets the bar membership requirements set forth in section 631(b)(1) and the chief judge of the district court certifies that a full-time magistrate is not reasonably available in accordance with guidelines established by the judicial council for the circuit. When there is more than one judge of a district court, designation under this paragraph shall be by the concurrence of a majority of all the judges of such district court, and when there is no such concurrence, then by the chief judge.

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